

Glossary of Terms

These terms reflect various methods of alternative dispute resolution available throughout the country. Not all of the terms are applicable to Kentucky practice.

A

adjudication: The solution to a particular conflict as determined by a judge or administrative hearing officer with the authority to rule on the issue in dispute. Adjudication implies that judgments will be rendered according to objective standards, rules, or laws.

alternative dispute resolution: (ADR) - Used narrowly to refer to a set of alternatives to litigation including mediation, arbitration, and summary jury trials. Used broadly it refers to all methods which resolve conflicts between parties by a means other than an adversarial or judicial process.

arbitration: The resolution of a dispute by submitting the matter under relaxed rules of procedure and evidence to a neutral, or panel of neutrals, for a decision, which is called an award. Depending on the situation, an arbitrator's decision can be binding or non-binding and the exact nature of the process and decision is usually prescribed before hand by court rule or contract. Arbitration tends to be more formal and judicial than other ADR processes, but less formal than a court procedure. An arbitrator may be anyone acceptable to the parties, usually lawyers, retired judges, and professionals with particular expertise in the subject matter of the dispute.

assessment - An impartial analysis of a conflict situation conducted with an eye towards determining potential paths by which parties may reach a resolution of their conflict. This usually includes personally interviewing the parties, researching the history of the conflict, and attempting to find agreement as to the core issues around which the conflict has evolved. The assessment sometimes leads to the involvement of a facilitator, the design of a means by which the parties may work with each other directly, or a decision that there is an adversarial nature to the conflict that can't be dealt with appropriately by ADR techniques. In mediation, assessment refers to the initial phase of the process that is used to screen a case for appropriateness and/or readiness for mediation.

B

"baseball" or "final-offer" arbitration: In this process, used increasingly in commercial disputes, each party submits a proposed monetary award to the arbitrator. At the conclusion of the hearing, the arbitrator chooses one award without modification. This approach imposes limits on the arbitrator's discretion and gives each party an incentive to offer a reasonable proposal, in the hope that the decision-maker will accept it. A related variation, referred to as "night baseball" arbitration, requires the arbitrator to make a decision without the benefit of the parties' proposals and then to make the award to the party whose proposal is closest to that of the arbitrator.

binding arbitration: An alternative dispute resolution process that concludes a dispute and is legally enforceable between the parties to that process. The disputing parties

choose a neutral person, or more typically a panel of three neutrals, to hear their dispute and render a final and binding decision or award.

"bounded" or "high-low" arbitration: The parties agree privately without informing the arbitrator that the arbitrator's final award will be adjusted to a bounded range. Example: P wants \$200,000. D is willing to pay \$70,000. Their high-low agreement would provide that if the award were below \$70,000, D would pay at least \$70,000; if the award exceeds \$200,000, the payment will be reduced to \$200,000. If the award is within the range, the parties are bound by the figure in the award.

C

caucus - A private meeting or series of meetings that takes place in concert with a dispute resolution process. Can include a meeting between the neutral third party and each of the interested parties separately. In large-scale group processes, it can consist of an informal meeting of parties with similar interests. The caucus serves to give parties a chance to create new alternatives, clarify their proposals and interests, gather information, and/or allow for a "cool-down period."

case valuation: ("Michigan Mediation"). This hybrid ADR process provides litigants in trial-ready cases with a written, non-binding assessment of the case's judgment value, delivered by a panel of three attorneys with subject-matter expertise after a very short hearing. If the panel's valuation is accepted by all parties, the case is settled for that amount. If any party rejects the panel's assessment, the case proceeds to trial. Used only in the federal and state courts in Michigan, the arbitration-like valuation process is known widely as "Michigan Mediation." Established in the Michigan state courts almost 20 years ago, today the process is used mainly for money-only contract, personal injury and civil rights cases.

collaborative planning: Collaborative planning is like collaborative problem solving, but it allows the parties to anticipate a conflict and to work collaboratively to plan and manage ways to avoid the conflict.

collaborative problem solving: Process by which people work together to define a problem, generate options, and identify objective criteria to reach a decision. It can, but does not necessarily, include the aid of a neutral facilitator.

co-med-arb: Process by which two different people perform the roles of mediator and arbitrator. Jointly, they preside over an information exchange between the parties, after which the mediator works with the parties in the absence of the arbitrator. If mediation fails to achieve a settlement, the case (or any unresolved issues) can be submitted to the arbitrator for a binding decision.

co-mediation: Mediation process in which there are two mediators who simultaneously or jointly conduct the process. Used in cases where mediators with different areas of expertise would be useful, when there are multiple parties involved, to achieve gender/ethnicity balance, and/or to model cooperation. It is also used as a training tool for new mediators as they co-mediate with experienced mediators.

community dispute resolution centers: A generic name used to describe various

kinds of community-based dispute resolution programs most of which offer mediation services using trained volunteers. They deal primarily with disputes between individuals with ongoing relationships (landlord-tenant, employer-employee, domestic, and neighborhood conflicts.) The largest centers draw much of their caseload from police referrals or from local courts and prosecutors' offices.

conciliation: This term has significantly different definitions depending upon the context. It refers to substantially different processes in federal and state statutes pertaining to the Equal Employment Opportunity Commission (EEOC), domestic relations court, and public employee collective bargaining procedures. In a broader social context it usually refers to steps taken by a third party to reduce the adversity and tension between groups in conflict, with the purpose of creating an environment where face-to-face negotiation is possible.

confidentiality: Provides that information shared during the course of a dispute resolution process is deemed private and is not to be revealed to anyone outside of the process. Typically, the expectations and the legal requirements regarding confidentiality are discussed before a process begins. Statutory exceptions: abuse-reporting requirements of KRS 209.030 and KRS 620.030

confidential listener: Provides that information shared during the course of a dispute resolution process is deemed private and is not to be revealed to anyone outside of the process. Typically, the expectations and the legal requirements regarding confidentiality are discussed before a process begins. The parties submit their confidential settlement positions to a third-party neutral, who without relaying one side's confidential offer to the other, informs them whether their positions are within a negotiable range. The parties may agree that if the proposed settlement figures overlap, with the plaintiff citing a lower figure, they will settle at a level that splits the difference. If the proposed figures are within a specified range of each other (for example 10 percent), the parties may direct the neutral to so inform them and help them negotiate to narrow the gap. And if the submitted numbers are not within the set range, the parties might repeat the process.

conflict: A broad term regarding an interaction between people with differing interests which are perceived as incompatible. Derived from the Latin *conflictus* meaning, "to strike together." Conflict is inevitable and constructive outcomes from conflict are frequently possible especially with the aid of a neutral. Conflicts involving a definable number of parties are usually referred to as disputes, which differ substantially from large-scale conflicts that arise between entire population groups, i.e. ethnic or national.

conflict management: A philosophy and set of skills designed to assist people in better understanding and dealing with conflict as it arises in all aspects of life.

consensus-based decision making: A method of seeking the resolution of a multi-party conflict or dispute, relying upon equal participation of all parties. The end goal is to develop an agreement, usually without voting, that all of the participants can live with. Though the individual parties may find parts of the agreement more or less appealing, they all agree to fully support the end result. The suitability of using consensus in resolving a conflict is usually assessed in a preliminary process (see **Assessment**).

convening: The bringing together of multiple parties with different interests to discuss and develop solutions to a conflict. A neutral must communicate the purpose, ground rules and other details of such a meeting with each party.

court annexed: Those alternative dispute resolution programs that are operated, funded, or sponsored by a court or receive referrals of disputes from a court.

court-annexed arbitration: An adjudicatory dispute-resolution process in which one or more arbitrators issue a non-binding judgment on the merits, after an expedited, adversarial hearing. The arbitrator's decision addresses only the disputed legal issues and applies legal standards. Under certain court programs, unless one of the parties rejects the non-binding ruling within a certain time period and requests to proceed to trial, the arbitration decision becomes final. By contrast, under other programs an arbitration decision remains non-binding without any need for a party to object and simply serves as a guide for the parties. Court annexed arbitration is used mainly in small- and moderate-sized tort and contract cases, when litigation costs are often disproportionate to the amounts at stake. Twenty-six federal district courts have established mandatory or voluntary arbitration programs and arbitration is common in many state courts. Still, new court-annexed arbitration programs are rare these days. Once the premier court ADR process, it has lost popularity in recent years. Most court ADR development focuses on mediation.

court minitrial: The minitrial is a flexible, non-binding settlement process primarily used out of court. During the past decade, some federal district judges have used their own version of the minitrial. Like the summary jury trial, the court minitrial is a relatively elaborate ADR method generally reserved for large disputes. In a typical court minitrial, each side presents a shortened form of its best case to settlement-authorized client representatives, usually senior executives. The hearing is informal, with no witnesses and a relaxation of the rules of evidence and procedure. A judge, magistrate judge or non-judicial neutral presides over the one or two-day hearing. Following the hearing, the client representatives meet, with or without the neutral adviser, to negotiate a settlement. At the parties' request, the neutral advisor may assist the settlement discussions by acting as a facilitator or by issuing an advisory opinion. If the talks fail, the parties proceed to trial.

D

dispute resolution (DR): A broad range of processes by which parties in conflict can work towards a resolution. It most often refers to facilitation, mediation, and arbitration.

dispute system design: A studied approach or procedural framework that analyzes the means by which disputes are handled within an organization. Appropriate dispute resolution processes are then instituted to handle the specific types of issues that arise in an organization.

E

early neutral evaluation: An assessment (see **Assessment**) of a dispute, usually conducted at the beginning of a court-connected ADR process by a neutral for a non-binding approximation of likely outcomes at trial based on summaries presented by the parties and/or their attorneys. It is intended to give parties an objective perspective on the strengths and weaknesses of their cases to assist them with settlement negotiation. Generally used prior to significant discovery.

F

facilitated negotiations: Negotiations between or among parties for the purpose of resolving differences, solving problems, and reaching decisions by consensus. Facilitated negotiations require the assistance of a qualified facilitator who runs the meetings, keeps the parties focused, guides them in the process, encourages ground rules, and takes notes.

facilitation: The process used to help a group of individuals or parties with divergent views reach a goal or complete a task to the mutual satisfaction of all participants. A facilitator helps the parties improve the definition of issues, develop options, keep on task, and ultimately increases the likelihood that a consensus will be reached.

facilitator: A person competent in the use of dispute resolution who provides a neutral's services to groups involved in a dispute or conflict. The facilitator provides procedural assistance to the parties, enhancing information exchange and working with the parties to develop and evaluate possible agreements that could lead to a resolution.

fact-finding: Usually used in relation to negotiation, mediation, or arbitration of complex disputes. This is a process by which facts relevant to a dispute are determined. These can be ascertained by a neutral fact-finder, a joint fact-finding effort involving the cooperation of disputing parties, reliance upon the data of independent sources, or a mixture of these. More narrowly defined, fact-finding is an independent process in which a neutral third-party investigates a dispute and issues a report establishing the relevant facts. The report may be used as a basis for settlement.

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incentive arbitration: In non-binding arbitration, the parties agree to a penalty if one of them rejects the arbitrator's decision, resorts to litigation, and fails to improve his position by some specified percentage or formula. Penalties may include payment of attorneys' fees incurred in the litigation.

interest-based negotiation: A process that seeks to discover and satisfy the underlying interests of parties rather than to meet the stated positions or demands that they bring to a negotiation.

J

judge-hosted settlement conferences: The most common form of ADR used in federal and state courts is the settlement conference presided over by a judge or magistrate judge. Almost 94 of the federal district courts use judicial settlement conferences routinely, and nearly one-third of the courts assign this role almost exclusively to magistrate judges. The classic role of the settlement judge is to articulate judgments about the merits of the case and to facilitate the trading of settlement offers. Some settlement judges and magistrate judges also use mediation techniques in the settlement conference to improve communication among the parties, probe barriers to settlement, and assist in formulating resolutions. In some courts, a specific judge or magistrate judge is designated as settlement judge. In others, the assigned judge (or another judicial officer who will not hear the case) hosts settlement conferences at various points during the litigation.

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M

mediation: Process in which a third party neutral facilitates communications and negotiations among parties to find a mutually acceptable resolution of a dispute. Although often considered a facilitative process, in some forms of mediation, the third party neutral may engage in evaluative tasks, such as helping parties assess likely outcomes and exploring the strengths and weaknesses of the arguments presented. The mediation process is generally voluntary and aims at a signed agreement defining the future behavior of the disputants. A mediator helps parties communicate, negotiate, and reach agreements and settlements but is not empowered to render a decision. The process may be mandatory or encouraged by the courts, particularly in divorce and custody matters, civil, and minor criminal cases.

mediation-arbitration (med-arb): A hybrid of mediation and arbitration (see definitions) that relies on a neutral that functions both as a mediator and an arbitrator. The process usually consists of framing the issues for both parties, sharing information, mediating those points where agreement can be reached, and finally the arbitrator making a decision on points where the parties cannot reach agreement. (See also co-med-arb.)

mini-trial: A non-binding procedure that expedites settlement by offering a realistic look at the possible outcome of full-fledged litigation. A neutral oversees an abbreviated process similar to a potential trial, including briefs, exhibits, and summery hearings. After the process, which usually lasts less than a week, the neutral may sometimes offer an advisory opinion about the likely outcome of such a case. The parties then return to negotiations with a realistic understanding of the possible outcomes should negotiations fail.

multi-party coordinated defense: A coordinated joint defense strategy in which a neutral facilitator helps multiple defendants negotiate, organize, and manage

cooperative joint-party arrangements that are ancillary to the main dispute. In the process, they streamline the steps toward resolution. Coordinated defense efforts include agreements to: limit infighting among defendants; use joint counsel and experts; assign and share discovery and research tasks; coordinate and share the results of procedural maneuvers; and apportion liability payments, should they be imposed.

multi-step: Parties may agree, either when a specific dispute arises, or earlier in a contract clause between business venturers, to engage in a progressive series of dispute resolution procedures. One step typically is some form of negotiation, preferably face-to-face between the parties. If unsuccessful, a second tier of negotiation between higher levels of executives may resolve the matter. The next step may be mediation or another facilitated settlement effort. If no resolution has been reached at any of the earlier stages, the agreement can provide for a binding resolution through arbitration, private adjudication or litigation. One form of multi-step ADR is the "wise man" procedure (see **wise men**), typically used when problems arise in long-term partnerships such as those in the oil and gas industry. Sometimes called "progressive negotiation" or "mutual escalation," this procedure refers matters first to a partnership committee that oversees the day-to-day operations of the project. If the problem cannot be resolved at that level, the wise-man option is employed.

N

negotiation: Process where parties directly exchange ideas, views, promises, and problems surrounding a dispute. Positional bargaining tends to focus on demands, and counter-demands of disputing parties, sometimes leading to a bargaining process where parties trade concessions and demands. Interest-based negotiations focus on the interests underlying one's position on an issue. The parties explore their needs, concerns, and eventually work on developing mutually acceptable solutions that meet as many of the disputants' interests as possible.

negotiated investments strategy: A mediation process, which has been used on a limited basis to bring together federal, state, local officials and community members to resolve differences of opinion and problems, related to the allocation and use of public resources. Examples of application include urban redevelopment, historic preservations, and planning for the allocation of public resources in the face of major financial cutbacks.

negotiated rule-making: (reg-neg): A facilitated consensus process by which government agencies draft a regulation in cooperation with a group representing all interested parties. A successful reg-neg leads to a proposed rule that all parties can support. The agency still retains authority over promulgation of the rule as it passes through the legal requirements regarding public participation. By encouraging participation by interested stakeholders, the process makes use of private parties' perspectives and expertise, and can help avoid subsequent litigation over the resulting rule.

neutral: An individual, often referred to as a third party, with no stake in the outcome of a dispute and no bias for one party over another. A neutral does not benefit from a particular outcome.

non-binding arbitration: This process works the same way as binding arbitration except that the neutral's decision is advisory only and not enforceable as to any party.

O

ombudsman, ombuds, ombudsperson: A neutral that receives and investigates complaints or grievances aimed at an institution by its constituents, clients, or employees. Ombudsmen have the power of persuasion, but not the authority to decide how a given dispute should be resolved.

P

partnering: A long-term commitment between two or more organizations for the purpose of achieving specific business objectives by maximizing the effectiveness of each participant's resources. This requires changing traditional relationships and practices to a shared culture without regard to organizational boundaries. The relationship is based on trust, communication, dedication to common goals, and an understanding of each other's individual expectations and values. Expected benefits include improved efficiency and cost effectiveness, increased opportunity for innovation, and continuous improvement of quality of services and outcomes.

position-based negotiation: A term that describes the traditional approach to negotiation in which the parties are firmly committed to their bargaining positions and exchange proposals and counter proposals in the anticipation that one or more parties will compromise to achieve a settlement that satisfies all parties.

predispute adr contract clause: A clause included in the parties' business agreement to specify a method for resolving disputes that may arise under that agreement. It may refer to one or more ADR techniques, even naming the third party that will serve as an arbitrator or mediator in the case. Predispute agreements requiring arbitration of consumer disputes, or entered into as a condition of employment, have generated substantial backlash from those who argue the clauses are adhesion contracts.

private judging: The popular name given to the procedure in which the court can (on stipulation of the parties) refer a pending lawsuit to a private neutral for trial with the same effect as though the case were tried in court. The verdict can be appealed through the regular appellate court system.

public policy mediation: A form of mediation that brings together representatives of business, public interest groups, and government to negotiate agreements on policy development implementation, or enforcement. Facilitators or mediators are usually used to organize and guide the process.

Q

R

reconciliation: Though not a formalized term, it describes steps taken to heal or improve relationships that have been damaged by a conflict.

regulatory negotiation: A form of public policy mediation where parties having a stake in the proposed government regulations reach agreement on key provisions through the assistance of a mediator or mediators.

S

settlement week: A court and bar sponsored mediation awareness program in which volunteer mediators assist litigants and attorneys in exploring ADR opportunities for settling civil cases. In a typical settlement week, a court suspends normal trial activity and, aided by bar groups and volunteer lawyer/mediators, devotes itself to the mediation of long-pending civil cases. Mediation is the mainstay ADR method in a typical settlement week. Volunteers conduct mediations in courtrooms, conference rooms and other areas of the courthouse. Sessions may last an hour or two, with additional sessions held as needed. Unresolved cases return to the court's docket.

special masters: Judicial adjuncts appointed by a judge to conduct mediation, arbitration, fact finding, or settlement negotiation. A special master may develop an agreement, implement one, or help enforce an agreement or a judge's decision.

summary jury trials: An in-court process in which attorneys for the parties submit a dispute to an advisory jury for the return of a non-binding verdict following the summarized factual and legal presentations.

T

two-track approach: Involves use of ADR processes or traditional settlement negotiations in conjunction with litigation. Representatives of the disputing parties who are not involved in the litigation are used to conduct the settlement negotiations or ADR procedure. The negotiation or ADR efforts may proceed concurrently with litigation or during an agreed-upon cessation of litigation. This approach is particularly useful in cases when: it may not be feasible to abandon litigation while the parties explore settlement possibilities; or as a practical matter, the specter of litigation must be present in order for the opposing party to consider or agree to an alternative mechanism. It also is useful when the litigation has become acrimonious or when a suggestion of settlement would be construed as a sign of weakness.

U

V

W

wise men/women: Respected senior executives of disputing companies who are uninvolved in the joint project. These officials are given a fairly short time frame (sometimes just 30 days) to investigate the dispute and recommend a solution. If that fails, the matter goes to a third step, usually binding arbitration. While pioneered in the oil industry, the wise man approach could also be useful in the high-technology field and other areas involving close and continuing business relationships.

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Z